IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 2ND MARCH 2007 / 11TH PHALGUNA 1928

WP(C).No. 32639 OF 2006(S)

E.P. 15/2003 IN
PHMA.114/2000 OF MILY COURT, THIRUVALLA

PETITIONER:

VIJAYAMMA,
ALANCHERIL HOUSE, MELUKARA MURI,
KOZHENCHERRY VILLAGE.

BY ADV. SRI.LIJU.V.STEPHEN

RESPONDENTS:
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1. SADASIVAN PILLAI,
PADINJARE ALANCHERIL HOUSE, MELUKARA MURI,
KOZHENCHERRY VILLAGE.

2. SANTHAKUMARI AMMA @ SANTHA S.PILLAI,
MANIVILETHU HOUSE, MALLAPUZHACHERRY MURI.

R2 BY ADV. SRI.JACOB P.ALEX

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/2//2007, THE COURT ON 2.3.2007, DELIVERED THE FOLLOWING:

WP(C) 32639/2006

APPENDIX

PETITIONER'S EXHIBITS:

EXT. P1	TRUE COPY OF THE ORDER IN CMA NO. 82/2005 OF THE DISTRICT COURT, PATHANAMTHITTA, DATED 17.10.2006.
EXT.P2	TRUE COPY OF THE NOTICE ISSUED FROM THE FAMILY COURT, THIRUVALLA TO THE PETITIONER DATED 24.11.2006.

RESPONDENTS' EXHIBITS:

NIL.

// TRUE COPY //

P.S. TO JUDGE.

knc/-

P.R. RAMAN & SIRI JAGAN, JJ.

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W.P.(C) NO. 32639 OF 2006

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DATED THIS, THE 2ND DAY OF MARCH, 2007

J U D G M E N T

Raman,J.

The second respondent filed O.P. (HMA) 114/2000 before the Family Court, Thiruvalla under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. She filed I.A. 17/2001 in the said original petition under Section 24 of the Hindu Marriages act seeking maintenance pendente lite and expense of the proceedings. Eventually, that application was allowed in 2001 permitting the second respondent herein to realize an amount of Rs.22,200/- as on that date. When the first respondent refused to pay the said amount, E.P. 15/2003 was filed and certain movable properties said to be belonging to the first respondent was attached on 10.11.2004 from the house of the first respondent. The said movables were released to the custody of the petitioner herein on an undertaking to produce the same as and when directed by the Family court. The petitioner herein claims to be the owner in possession of ten cents of property comprised in Sy. No. 537/10/2 of Kozhencherry Village wherein she is stated to have built a residential house and she is residing with her family in the aforesaid house.

The first respondent is none other than the brother of the petitioner's deceased husband and the husband of the second respondent. According to the petitioner, the attachment of the properties is without bona fides and actually, the movables belonged to her in which the respondents have no manner of right. She contends that though she objected to the attachment and the same was noticed by the Amin, it is not seen recorded. She therefore, filed a claim petition as E.A. 37/2005 before the Family Court, Thiruvalla under Order 21 Rule 58 inter alia contending that the properties belongs to her and seeking to lift the attachment. When the Family Court did not consider the said petition and posted the case for proclamation of sale of the attached properties, petitioner filed W.P.(C) 19085/2005 before this Court, which was eventually disposed of directing the Family Court not to take further steps without disposal of E.A. 37/2005. Subsequently, the said application before the Family Court was dismissed for default. There was no appeal against the said order and thereafter, O.S. 402/2005 was filed by the petitioner before the Munsiff's Court, Pathanamthitta, under order 21 Rule 58(5) of the Code of Civil Procedure. I.A. 1616/2005 was also filed in the said suit seeking for an injunction restraining the sale of the properties attached. Though initially, an ex parte order of injunction was granted in favour of the petitioner, on contest the same was vacated and I.A.

1616/21005 was dismissed by the Munsiff's Court, against which the petitioner preferred an appeal before the District Court as C.MA. 82/2005 before the District Court, Pathanamthitta. The said _appeal was dismissed by the District Court by Ext.P1 order dated 17th October, 2006, against which the present writ petition is filed. Petitioner seeks to quash Ext.P1 order.

2. The District Court found that the fact that plaint item No.1 immovable property belongs to the plaintiff is beyond dispute. But it was contended that the husband of the defendant who is the brother-in-law of the plaintiff is residing along with her in the building in plaint Item No.1 property and the movables belong to him. It was found by the District Court that the learned Munsiff did not consider the merits of the contentions in depth in view of Section 41(b) of the Specific Relief Act. The District Court also did not enter any finding on the merits of the contentions as it obviously agreed with the finding of the Munsiff's court that the bar under Section 41(b) of the Specific Relief Act is attracted and no injunction could be granted. The correctness of the said decision , therefore, arises for consideration.

3. According to the petitioner, the District Court ought to have found that the claimant's right to adjudicate under order 21 Rule 58(5) is a

statutory right and the court, while adjudicating the said right, has an inherent power to safeguard the interest of the parties and in such circumstances, Section 41(b) of the Specific Relief Act is inapplicable in the factual situation. The respondent, on the other hand, would contend that the claim petition E.A. 37/2005 in E.P. 15/2003 having been dismissed by the Family Court, in the absence of any appeal therefrom, the same has become final. It is also contended that I.A. 1616/2005 filed in O.S. 402/2005 before the Munsiff's Court is virtually an application for stay of execution proceedings which was rightly dismissed by the Munsiff's Court, in view of the provisions contained in Section 41(b) of the Specific Relief Act. The appellate court, after re-considering the matter in its entirety, while dismissing the appeal has also agreed with the said finding of the Munsiff's Court. It is further contended that the dismissal of the claim petition by the Family Court is for default and is not as though the claim is not entertained. The suit filed under order 21 Rule 58(5) itself is not maintainable. So also the interim order sought by the petitioner in the suit is not allowable since the Family Court is not inferior to that of the Munsiff's Court and hence the bar under Section 41(b) of the Specific Relief Act squarely applied.

4. Head both sides. Even though both sides addressed their

arguments on the maintainability of the suit under Order 21 Rule 58(5) of the Code of Civil Procedure, the suit itself is pending consideration before the Munsiff's Court. Hence the maintainability of the suit itself, if raised by the parties, would form a basic issue for decision on trial. The parties have still opportunities to address their contentions regarding the same before the Munsiff's Court, and the present writ petition being filed only against the rejection of the interim injunction application filed by the petitioner and in the circumstances stated above, learned counsel appearing for the petitioner was asked as to whether he actually invites a decision regarding maintainability of the suit at this stage. Learned counsel submitted that in view of the above factual position, he is not inviting this Court to decide upon the maintainability of the suit itself in the writ petition and the same be left open. We also feel that since the limited question arising for consideration is the correctness or otherwise of the rejection of the application for injunction, it will be inappropriate to pre-determine the issue at this stage and actually it does not arise for consideration either. Rather the parties are left to take up their contentions at the appropriate stage of the suit and in that view, we do not propose to enter a finding on the maintainability of the suit as such, at this stage. As a matter of fact, the District Court has also held that the learned Munsiff did not consider the

maintainability and that is a matter to be decided by the trial court and as such, the maintainability is not a matter for consideration at this stage.

5. Now, we shall examine the contention regarding the maintainability of the interim injunction application filed as I.A. 1616/2005 and the correctness of the order passed by the court below. As per Section 41(b) of the Specific Relief Act "An injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought."

6. According to the petitioner, the injunction sought for is only from selling the movables attached and not an injunction sought to restrain the respondent from prosecuting or proceeding with the execution petition. We cannot agree. When the movables are attached in execution of an order to realise certain amount as already ordered by the Family Court, to restrain the sale of the attached property is nothing but an injunction sought against the further proceedings in execution of that order. When a claim petition was filed and was not prosecuted, there arise no other impediment for execution of the order by sale of the movables. Instead of seeking to restore the claim petition or to file an appeal therefrom, petitioner has chosen to institute a separate civil suit. In the interim injunction application, the maintainability of which was decided by the court below, that court after

placing reliance on the provisions contained in Section 41(b) of the Specific Relief Act held that no such injunction can be granted in view of the bar created thereunder. On a reading of Section 41(b) of the Specific Relief Act, it admits of no doubt that an injunction cannot be granted restraining a person from prosecuting any proceeding in a court not subordinate to that from which the injunction is sought for.

7. As we have already observed, to restrain the respondents from the sale of the properties already attached in execution of the order, is nothing but an injunction sought to restrain the proceedings in execution of an order passed by the Family Court. As per Section 7(1) of the Family Courts Act, the jurisdiction of the Family Court has been in very wide terms couched and it can and shall exercise all the jurisdiction exercisable by any District Court or any Subordinate civil Court under any law in respect of suits and proceedings of the nature referred to in the explanation. As per Section 7(1)(b) the Family Court is deemed, for the purpose of exercising such jurisdiction under such law, to be the District Court, or as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

8. Admittedly, the proceedings now pending before the Family Court are proceedings in the nature referred to under the explanation to Section 7

(1)(b). The Family Court, thus, has to be deemed as a District Court and hence not subordinate to the Munsiff's Court. If so, the bar under Section 41(b) will squarely apply in which case no injunction can be granted against the proceedings pending before the Family Court by a Munsiff's Court.

9. It was then contended that the provisions contained in Section 41 (b) of the Specific Relief Act will not apply to an application for temporary injunction and at any rate, the Munsiff's Court, as a civil court, is competent to grant the injunction sought for under its inherent powers as saved by Section 151 of the Code of Civil Procedure. In answer to this, we need only refer to the decision of the apex court in **Cotton Corporation of India v. United Industrial Bank [(** 1983) 4 SCC 625]. From paragraph 10 of the said decision, at page 635, it can be seen that the same contention was raised by the respondent Bank in the said case contending for the position that Section 41(b) of the Specific Relief Act is not attracted as it deals with perpetual injunction and temporary or interim injunction is regulated by the Code of Civil Procedure specially so provided in Section 37 of the Act. Dealing with the said contention, the apex court held as follows:

> "Expression "injunction" in Section 41(b) is not qualified by an adjective and therefore, it would comprehend both interim and perpetual injunction. It is however, true that Section 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the court are

regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of the Code of Civil Procedure being confined to temporary injunction, an unnecessary grey area will develop. It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In State of Orissa v. Madan Gopal Rungta (1952 SCR 28) a Constitution Bench of this Court clearly spell out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding'. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso fact the temporary relief of the same nature cannot be granted. To illustrate this point, let us take the relief which the Bank seeks in its suit. The prayer is that the Corporation be restrained by an injunction of the court from presenting a winding up petition under the Companies Act, 1956 or under the Banking Regulation Act, 1949. In other words, the Bank seeks to restrain the Corporation by an injunction of the court from instituting a proceeding for winding-up of the Bank. There is a clear bar in Section 41(b) against granting this relief. The court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief,

ipso facto temporary relief cannot be granted in the same terms. The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings."

Mr. Sen, however, urged that even though the Legislature has materially altered the language of the corresponding provision in Section 56(b) of 1877 Act while enacting Section 41(b), yet the change in language would have no impact on the view of law taken by the courts while interpreting Section 56(b) of the repealed Act. Proceeding along this line, Mr. Sen urged that under Section 56(b) of the 1877 Act even though injunction could not be granted to stay proceedings in a court not subordinate to that from which injunction is sought, the court by an interpretative process spelt out a power to grant injunction in personam against a party from instituting a proceeding. It is true that giving a literal meaning to the provision contained in Section 56 (b) which denied the power to the court to grant injunction to stay proceedings in a court not subordinate to that from which injunction is sought, the court demarcated the unoccupied area by holding that even if the court cannot grant injunction to stay proceeding, it can certainly injunct a party from instituting or prosecuting a proceeding in a court not subordinate to that from which the injunction was sought. But it is this very interpretation which attracted the attention of the Legislature, and it responded by specific change in language to nullify the interpretation so that it becomes crystal clear that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction was sought. The power to grant injunction in personam was thus legislatively curtailed. Legislative response to court's interpretation has to be noticed and in our opinion the alteration in the language provides the legislative response to the judicial interpretation and

cannot be wished away, but be given effect."

10. The above dictum laid down by the apex court is an authority for the proposition that if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of the Code of Civil Procedure being confined to temporary injunction, an unnecessary grey area will develop and the present prayer for an injunction restraining the respondents from selling the properties in execution of the order passed by the Family Court would amount to restraining them from prosecuting the proceedings now pending before the Family Court in execution. There is thus, a clear bar under Section 41(b) against granting such a relief. Since the court has no jurisdiction to grant a perpetual injunction restraining the respondents from prosecuting any proceedings in a court not subordinate to that of the Munsiff's Court, as a relief ipso facto temporary cannot be granted in the same terms. As far as the contention that the Munsiff's Court can still grant injunction in exercise of its inherent powers is concerned, the same is untenable. A similar contention was raised before the apex court in the decision cited supra. Reliance was also placed on the decision of the apex court in **Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal** (AIR 1962 SC 527). In the said decision,

Raghubar Dayal, J. speaking for the majority, in terms, held that the court has inherent power to issue temporary injunction in cases which were not covered by the provisions of Order 39 of the Code of Civil Procedure. Shah, J. in the dissenting judgment took the contrary view and relied upon **Padam Sen v. State of U.P.** (AIR 1961 SC 218) . The position was then summarized by the apex court thus:

> "In view of the majority decision, it must be conceded that the court can in appropriate cases grant temporary injunction in exercise of its inherent power in cases not covered by Order 39 CPC. But while exercising this inherent power the court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b) is one such provision. And it must be remembered that inherent power of the court cannot be invoked to nullify or stultify a statutory provision. We have meticulously gone through the appellate judgment and we find not the slightest reference to the invocation of the inherent power of the court in granting the order of injunction now under challenge. Not only that but the Court has not held that the contention of the Corporation is frivolous or untenable or the claim is mala fide. . . . . ."

11. In **Sukumaran v. Radha,** (1992(1) KLT 134) after following the decision of the apex court in the decision cited supra, it was held as follows:

> "Section 41(b) applies to perpetual as also temporary injunctions. The court of original jurisdiction, which in

> this case is the Munsiff's court, has no jurisdiction to grant interim injunction to restrain the defendants from executing the decree in the court of Sub Judge. The appellate court's powers are the same as those of the Munsiff. The appeal from an order refusing to grant injunction is but a continuation of the application for injunction made before the Munsiff. The appellate court is presided over by the District Judge. But his power does not transcend the powers of the Munsiff, the proceedings before whom are continued in appeal. The powers of the appellate court are co-extensive and co-terminus with those of the trial court. The court exercising the appellate powers, may, in the judicial hierarchy, be superior to the court which refused to grant the injunction. But what it hears and decides in appeal is a continuation of the proceedings in which the order appealed from was made. Therefore, the appellate court is an extension of the trial court with the power to judge the correctness of the order appealed from. By its very constitution as an extended trial court, it is subject to the same limitations which circumscribe the jurisdiction of the trial court. Since the Munsiff has no jurisdiction to restrain the defendants from instituting or prosecuting, proceedings for execution before the subordinate court, the District Court in appeal, too has no jurisdiction so to restrain the defendants.. . . . . ."

12. The above view expressed states the correct position of law. In this case, even according to the petitioner, one of the prayers in the plaint is for a permanent prohibitory injunction and the temporary injunction was sought for by filing I.A. 1616/2005, which is evidently one filed under Order 39 CPC and in view of the specific bar contained in Section 41(b) of the Specific Relief Act, the court cannot, in exercise of its inherent power,

grant any injunction as sought for overlooking such statutory provisions which will amount to defeating the statutory intention contained in Section 41(b) as noticed above. Hence we reject this contention as well.

13. In **Devasia Chacko v. Venkita Krishna Iyer** (1992(1) KLT 850) this Court held in para 26 that neither a permanent injunction nor a temporary injunction under Order 39 or under the inherent powers of the court under Section 151 can be invoked in view of the express bar contained in Section 41(b) of the Specific Relief Act. For the above reasons, we reject the contentions of the appellant.

In the result, we find no merits in this writ petition. It is accordingly dismissed.

P.R. RAMAN,
(JUDGE)

S. SIRI JAGAN,
(JUDGE)

knc/-